Supreme Court, U.S.
FILED
OCT 17 2001
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(2)

No. 01-204

IN THE

Supreme Court of the United States

KISSIMMEE RIVER VALLEY SPORTSMAN ASSOCIATION,

Petitioner,

v.

CITY OF LAKELAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Circuit Court of Appeals for the Eleventh Circuit concluded that the Federal Aid in Sport Fish Restoration Act (Act), 16 U.S.C. §§ 777-777m, in conjunction with the regulations promulgated at 50 C.F.R. §§ 80.1-80.27, does not create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act and that, as a result, Petitioner, Kissimmee River Valley Sportsman Association, failed to state a cause of action under 42 U.S.C. § 1983. In reaching this holding, the Eleventh Circuit necessarily concluded that a federal regulation, standing alone, cannot create a federal right enforceable under 42 U.S.C. § 1983.

The first question presented is whether the court of appeals properly concluded that the Act, in conjunction with its regulations, does not create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act and that, therefore, Petitioner does not have any right enforceable under 42 U.S.C. § 1983.

The second question presented is whether the court of appeals properly concluded that a federal regulation, standing alone, cannot create a federal right enforceable under 42 U.S.C. § 1983.

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STATUTES, REGULATIONS, AND ORDINANCES INVOLVED IN THE CASE

1. Section 1983 of Title 42 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any rights, privileges, or immunities secured by the Constitution and laws*, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

2. Section 777g(b)(1) of Title 16 of the United States Code provides, in pertinent part:

> Each State shall allocate 15 percent of the funds apportioned to it for each fiscal year under section 777c of this title for the payment of up to 75 per centum of the costs of *the acquisition, development, renovation, or improvement of facilities (and auxiliary facilities necessary to insure the safe use of such facilities) that create, or add to, public access to the waters of the United States to improve the suitability of such waters for recreational boating purposes* . . .

3. Section 80.24 of Title 50 of the Code of Federal Regulations provides, in pertinent part:

> The State shall allocate at least 10 percentum of each annual apportionment under Federal Aid in Sport Fish Restoration Act for recreational boating access facilities. All facilities constructed, acquired, developed, renovated, or maintained (including those existing structures for which maintenance is provided) must be for the purpose of providing additional, improved, or safer access of public waters for boating recreation as part of the State's effort for the restoration, management, and public use of sport fish. *Though a broad range of access facilities and associated amenities can qualify for funding under the 10 percent provision, power boats with common horsepower ratings must be accommodated, and, in addition, the State must make reasonable efforts to accommodate boats with larger horsepower ratings if they would not conflict with aquatic resources management . . .*

4. Section 58-32 of the Lakeland City Code provides, in pertinent part:

> It shall be unlawful for any person to operate any airboat upon any of the lakes within the city . . . For purposes of this section, "airboat" shall mean any boat, sled, sea skiff, or swamp boat pushed, pulled or propelled by air power generated by a motor of more than 25 horsepower.

STATEMENT OF THE CASE

On February 12, 1999, Petitioner filed suit against the City of Lakeland (City), seeking, *inter alia*, declaratory and injunctive relief under 42 U.S.C. § 1983. Petitioner alleged that the Federal Aid in Sport Fish Restoration Act (Act), 16 U.S.C. §§ 777-777m, and its regulations promulgated at 50 C.F.R. §§ 80.1-80.27 create a federal right to equal access for boats of common horsepower ratings at recreational boating access facilities funded under the Act. Petitioner further alleged that Section 58-32 in the Lakeland City Code, which prohibits the use of airboats on any lakes within the City, violates the federal right to equal access created by the Act and its regulations.

The City filed an Amended Motion to Dismiss, with a Memorandum of Law, arguing, *inter alia*, that Petitioner failed to state a cause of action for which relief could be granted under 42 U.S.C. § 1983. Specifically, the City argued that neither the Act nor its regulations, whether read together or separately, create a federal right to equal access that is enforceable under 42 U.S.C. § 1983.

On August 17, 2001, the district court granted the City's Motion and dismissed Petitioner's suit with prejudice. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 60 F. Supp. 2d 1289 (M.D. Fla. 1999). (Pet. App. at 9.)

On May 10, 2001, the court of appeals affirmed the district court's dismissal with prejudice. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001). (Pet. App. at 1.) Specifically, the court of appeals noted that a right to equal access for boats with

common horsepower ratings, if any existed at all, could only be found in the language of 50 C.F.R. § 80.24 — not the Act itself. *See id.* at 1327. The court concluded that this regulation was "too far removed from [c]ongressional intent" to create an enforceable right: "Nothing in the [Act] suggests a right based on equality and comparability. In fact, . . . [50 C.F.R. § 80.24] imposes new and 'distinct obligations' not found in the [Act] itself . . . [and] goes far beyond merely further defining or fleshing out the context of any 'federal right' found in the [Act] itself." *Id.* Accordingly, the court of appeals held that the Act and its regulations do not confer a federal right to equal access that is enforceable under 42 U.S.C. § 1983. *See id.*

This appeal ensued.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Writ of Certiorari because Petitioner has failed to identify any "real and embarrassing conflict of opinion and authority" among the United States courts of appeal. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1954); Sup. Ct. R. 10(a). Likewise, Petitioner has failed to raise any "special and important" questions of federal law that this Court has not yet answered. *See Rice*, 349 U.S. at 74; Sup. Ct. R. 10(c).

Specifically, the Petition is deficient for one basic reason: it completely ignores the import of *Blessing v. Freestone*, 520 U.S. 329 (1997), in analyzing the questions presented. In *Blessing*, this Court illuminated the circumstances under which a federal regulation, in conjunction with a federal statute, can create a federal right enforceable under 42 U.S.C. § 1983. *See* 520 U.S. at 345. Consistent with this Court's precedent in determining the existence of a federal right,

Blessing requires courts to first examine a statute's underlying congressional intent before turning to that statute's implementing regulations. *See id.* After ascertaining whether Congress intended to create a federal right, courts must then determine whether the statute's regulations adequately implement that congressional intent or whether the link between the regulation and the statute is simply too tenuous to give rise to an enforceable federal right that is based, in part, on a federal regulation. *See id.*

In light of *Blessing*, this Court should deny the Petition for three specific and compelling reasons. First, only the Ninth and the Eleventh Circuit Courts of Appeal have considered whether the Act and its regulations create a federal right to equal access that is enforceable under 42 U.S.C. § 1983. To the extent that the Ninth Circuit conflicts with the Eleventh Circuit, the Ninth Circuit's analysis is incomplete because it pre-dates *Blessing*. As a result, the Ninth Circuit fails to adhere to *Blessing*'s requirement that courts establish a clear link between congressional intent and a statute's implementing regulations before enforcing a federal right that is based, in part, on a federal regulation. Second, since *Blessing*, only the Eleventh, Seventh, and Sixth Circuit Courts of Appeal have considered the broader issue of whether federal regulations, by themselves, can create a federal right enforceable under 42 U.S.C. § 1983. Because the Eleventh and Seventh Circuits are consistent with each other and with *Blessing* and only the Sixth Circuit is not, no widespread conflict exists among the courts of appeal. Finally, Petitioner ultimately seeks relief based on the perceived misapplication of a properly stated rule of law, thereby rendering this Court's review unnecessary.

I. Since *Blessing*, Only the Eleventh Circuit Has Considered Whether the Act and its Implementing Regulations Create a Federal Right.

Only the Eleventh Circuit and the Ninth Circuit have considered whether the Act and its implementing regulations create a federal right to equal access for power boats of common horsepower ratings. *See Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001); *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995). While the Eleventh Circuit held that the Act and its implementing regulations do not create a federal right to equal access, the Ninth Circuit did find that a federal right exists. *Compare Kissimmee River Valley*, 250 F.3d at 1326-27 *with Buckley*, 66 F.3d at 192-93. To the extent that *Buckley* conflicts with *Kissimmee River Valley*, the Ninth Circuit's analysis is incomplete because it pre-dates this Court's decision in *Blessing*. As a result, the Ninth Circuit fails to adhere to *Blessing*'s requirement that courts establish a clear link between congressional intent and a statute's implementing regulations before enforcing a federal right that is based, in part, on a federal regulation.

In its opinion, the Eleventh Circuit noted that the purpose of the Act is to provide funding for fish restoration and management projects and for creating and improving public access to the waters of the United States. *See Kissimmee River Valley*, 250 F.3d at 1326-27; *Buckley*, 66 F.3d at 192. Because the Act itself does not mention equal access for boats of common horsepower ratings, the Eleventh Circuit necessarily turned to the Act's regulations, specifically 50 C.F.R. § 80.24, to identify this right. *See Kissimmee River Valley*, 250 F.3d at 1326-27. Therefore, the Eleventh Circuit had to expressly determine whether 50 C.F.R. § 80.24, either by itself or in conjunction with the Act, created a federal right enforceable under 42 U.S.C. § 1983.

To answer this question, the Eleventh Circuit relied on its own precedent, *Harris v. James*, 127 F.3d 993 (11th Cir. 1997), which was issued about six months after *Blessing*. *See Kissimmee River Valley*, 250 F.3d at 1326-27. *Harris*, in turn, evaluated *Blessing* and this Court's long-standing test to determine whether a federal statute creates a federal right enforceable under 42 U.S.C. § 1983:

> Such an inquiry turns on whether the provision in question was intend[ed] to benefit the putative plaintiff . . . If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the government unit . . . or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.[1]

Harris, 127 F.3d at 999 (quoting *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990)).

This test has governed § 1983 federal rights analysis as it applies to statutes for many years. *See Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423-24 (1987); *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 508-10 (1990); *Suter v. Artist M.*, 503 U.S. 347, 355-57 (1992); *Blessing*, 520 U.S. at 340-41. Notably, *Blessing* did not change this analysis; it simply clarified that congressional intent is the cornerstone of any federal rights analysis — even when a federal regulation, and not a statute,

1. After applying this three-prong analysis, courts must also consider whether the statute at issue explicitly or implicitly forecloses enforcement under 42 U.S.C. § 1983. *See Blessing*, 520 U.S. at 341.

seemingly establishes the federal right that a putative plaintiff seeks to enforce under 42 U.S.C. § 1983. *See Blessing*, 520 U.S. at 345.

After examining the contours and development of this three-prong test, the *Harris* court concluded that only Congress can create a federal right enforceable under 42 U.S.C. § 1983. *See Harris*, 127 F.3d at 1011. Because the three-prong test ultimately probes statutes for their underlying congressional intent, *Harris* rejected the notion that this test could be applied exclusively to federal regulations. *See id.* at 1008-10 ("To hold otherwise would be inconsistent with the driving force of the Supreme Court precedent requiring a [*c*]*ongressional* intent to create federal rights and with the Supreme Court directive that courts must find that Congress has *unambiguously* conferred federal rights on the plaintiff."). Finally, *Harris* concluded that a federal regulation, standing alone, can never create a federal right. *See id.* at 1011.

Instead, *Harris*, consistent with *Blessing*, requires litigants to first evaluate the controlling statute under the three-prong test to determine whether Congress has indicated an intent to create a federal right. *See Harris*, 127 F.3d at 1009. If not, then the inquiry ends, and the regulations become irrelevant to the federal rights analysis. *See id.* If, on the other hand, Congress did suggest an intent to create a federal right, then courts may examine the relevant regulations to determine whether those regulations explain the federal right intended by Congress. *See id.* If so, then the statute, in conjunction with its regulations, may create a federal right enforceable under 42 U.S.C. § 1983. *See id.* If the regulation, however, goes beyond explaining the statutory right and imposes obligations new and distinct from the statute, then the "regulation is too far removed from congressional intent to constitute a 'federal right' . . ." *Id.*

The *Harris* court's analysis does not create a new test in § 1983 jurisprudence, nor is it inconsistent with this Court's precedent. (Pet. at 6-7.) To the contrary, *Harris* and *Kissimmee River Valley* adhere to this Court's requirement in *Blessing* that congressional intent guide a court's federal rights analysis — even when the federal right seemingly arises from a federal regulation. *See Harris*, 127 F.3d at 1008-09; *Kissimmee River Valley*, 250 F.3d at 1326-27. Likewise, the Eleventh Circuit's analysis is not "premised upon a wariness of administrative regulations" as Petitioner suggests, (Pet. at 7), but, instead, emphasizes that federal regulations do play a role in both determining and then explaining congressional intent to create a federal right. *See Harris*, 127 F.3d at 1011; *Kissimmee River Valley*, 250 F.3d at 1326-27. Finally, the test articulated by *Harris* and implemented by *Kissimmee River Valley* is not devoid of "any useful analytical precision." (Pet. at 7.) Courts have consistently relied on federal regulations to determine congressional intent and interpret statutory provisions. *See Harris*, 127 F.3d at 1011-12. In short, Petitioner's criticisms of *Harris* and *Kissimmee River Valley* are without merit.

Following *Harris* and *Blessing*, the Eleventh Circuit in this case first determined that the Act, standing alone, does not suggest a right to equal access for power boats of common horsepower ratings. *See Kissimmee River Valley*, 250 F.3d at 1327. Then, the court concluded that 50 C.F.R. § 80.24 imposes new and distinct obligations from the Act and is, therefore, "too far removed" from congressional intent to constitute a federal right. *Id.* The court of appeals concluded that the Act and its regulations do not create a federal right of equal access enforceable under 42 U.S.C. § 1983. *See id.*

In *Buckley*, the Ninth Circuit applied the three-prong test at once to the Act and its regulations. *See* 66 F.3d at 192. Upon applying the three-prong test, the Ninth Circuit concluded that the Act, in conjunction with its regulations, confers a federal right to equal access. *See id.* at 192-93.

Because each court of appeals places different emphasis on the Act's regulations to determine whether a federal right exists, the explicit holdings of *Kissimmee River Valley* and *Buckley* conflict. *Compare Kissimmee River Valley*, 250 F.3d at 1327 *with Buckley*, 66 F.3d at 192. *Buckley* seemingly applies the three-prong test at once to both the Act and its implementing regulations, thereby treating the regulations and the Act similarly. *See Buckley*, 66 F.3d at 192. The Eleventh Circuit, on the other hand, declines to apply the three-prong test directly to the Act's implementing regulations and, instead, determines first whether Congress intended to create a federal right and then looks only secondarily to the regulations to define that federal right. *See Kissimmee River Valley*, 250 F.3d at 1326-27. *See also Harris*, 127 F.3d at 1008-10. This discrepancy between the courts of appeal rests in the fact that the Ninth Circuit was without this Court's emphasis in *Blessing* that congressional intent is the cornerstone of any § 1983 federal rights analysis — even when the federal right seemingly arises from a federal regulation. *See Blessing*, 520 U.S. at 345. Accordingly, the Ninth Circuit fails to first determine whether the Act expresses a congressional intent to create a federal right to equal access and second, whether the Act's implementing regulations are sufficiently linked to the Act's underlying congressional intent to create a federal right to equal access based on 50 C.F.R. § 80.24. In other words, *Buckley* fails to determine whether the Act's regulations implement the Act's congressional intent or go beyond it. Therefore, the *Buckley* analysis is incomplete under § 1983 jurisprudence since *Blessing*.

As a result, any conflict that may exist between the Ninth and Eleventh Circuits is not as direct as Petitioner would have this Court believe. To the contrary, any conflict that exists is minimal. Only the Eleventh Circuit has considered whether the Act and its regulations create a federal right to equal access in light of *Blessing*. Therefore, no "real and embarrassing conflict of opinion and authority" exists among the courts of appeal, and this Court should deny the Petition. *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 79 (1954).

II. Any Conflict Among the Courts of Appeal is Not "Real and Embarrassing."

The Petition seeks to invoke this Court's certiorari jurisdiction by pointing to an alleged "widespread debate" among the courts of appeal about whether a federal regulation can create a federal right under 42 U.S.C. § 1983. (Pet. at 8-9.) The Petition, however, fails to cite a single case that has examined this issue since *Blessing*. (Pet. at 8-9.) Despite the Petition's oversight, only three courts of appeal — the Eleventh, Sixth, and Seventh Circuits — have considered whether a federal regulation, by itself, can create a federal right in light of *Blessing*. Because the majority of the courts of appeal have not had ample time to apply and develop *Blessing*'s analysis, any conflict that exists among the courts of appeal is not "real and embarrassing" and, therefore, not sufficient to invoke the "limited reviewing power to which this Court is confined." *Rice*, 349 U.S. at 70, 74, 79.

Since *Blessing*, the Eleventh Circuit has held that because congressional intent is "the driving force" of this Court's federal rights analysis, a federal regulation, by itself, can never create a federal right. *See Harris*, 127 F.3d at 1008-

09, 1011; *Kissimmee River Valley*, 250 F.3d at 1326-27. In reaching its conclusion, the Eleventh Circuit noted that regulations may play an important role in explaining congressional intent to create a federal right but may not impose new and distinct obligations rising to the level of a federal right. *See Harris*, 127 F.3d at 1009-1[illegible]

Without explicitly confronting whether a federal regulation, by itself, may create a federal right, the Seventh Circuit has indicated its agreement with the Eleventh Circuit's analysis of the issue. *See Marie O. v. Edgar*, 131 F.3d 610, 620 n.17 (7th Cir. 1997). In *Marie O.*, the Seventh Circuit applied the three-prong test to the statute at issue to determine whether Congress intended to create a federal right. *See id.* at 618-22. The court then relied on the statute's regulations to define and explain that right. *See id.* at 620. Like *Blessing*, *Harris*, and *Kissimmee River Valley*, the Seventh Circuit noted that congressional intent is the focus of a § 1983 federal rights analysis and that regulations may only "further define and delineate the meaning of a statute to aid [a court's] analysis regarding whether the statutory and regulatory scheme creates rights enforceable under § 1983." *Id.* at 620 n.17.

In *Boatman v. Livingston*, however, the Sixth Circuit explicitly rejected the Eleventh Circuit's analysis in *Harris*. *See* 164 F.3d 286, 288-89 (6th Cir. 1998). Instead, the Sixth Circuit held that federal regulations have the force of law and, therefore, may create federal rights under 42 U.S.C. § 1983. *See id.* The court failed to cite *Blessing* and relied on precedent that pre-dates *Blessing*. *See id.* Even worse, the Sixth Circuit failed to analyze whether any congressional intent existed to create a federal right enforceable under 42 U.S.C. § 1983. Instead, the Sixth Circuit seemed to adopt

a bright-line test: any valid regulation may create a federal right enforceable under 42 U.S.C. § 1983. This Court's statement in *Blessing*, however, was clear: "our inquiry focuses on congressional intent." *Blessing*, 520 U.S. at 341. Nevertheless, the Sixth Circuit, and now Petitioner, have chosen to ignore this analysis.

One errant court does not create a "widespread debate" among the courts of appeal. Because the majority of the courts of appeal have not yet applied *Blessing*'s analysis to a federal regulation, the passage of time may further illuminate or completely extinguish the differences created by the Sixth Circuit's "force of law" analysis. *See Rice*, 349 U.S. at 77; *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("Resolution here . . . can await a day when the issue is posed less abstractly."). *See also McMonagle v. Northeast Women's Ctr., Inc.*, 493 U.S. 901, 901-03 (1989) (White, J., dissenting) (noting several cases in which this Court has declined to exercise jurisdiction where only one or two courts of appeal appear to conflict). Therefore, this Court should deny the Petition to allow the issue to percolate and further develop in the lower courts.

III. Petitioner Asserts Error that is Inappropriate for this Court's Review.

At bottom, Petitioner ultimately asks this Court to adopt a test that "simply requires consideration of the statute and regulation together." (Pet. at 11.) Because this is exactly the test that *Blessing*, *Harris*, and *Kissimmee River Valley* require, Petitioner seeks to invoke this Court's jurisdiction based on a perceived misapplication of a properly stated rule of law. As expressly recognized by this Court in its own rules, certiorari review is inappropriate to address such errors. *See* Sup. Ct. R. 10.

Specifically, *Blessing*, *Harris*, and *Kissimmee River Valley* require courts to first ascertain whether congressional intent exists to create a federal right and then to determine whether the regulations are sufficiently linked to that congressional intent. *See Blessing*, 520 U.S. at 345; *Harris*, 127 F.3d at 1009; *Kissimmee River Valley*, 250 F.3d at 1326-27. In other words, these cases already require what Petitioner is seeking here: that courts consider statutes and their regulations together under a § 1983 federal rights analysis. The court of appeals below applied this analysis to the Act and its regulations to determine that a federal right to equal access does not exist. *See Kissimmee River Valley*, 250 F.3d at 1326-27. Petitioner simply disagrees with this outcome. Therefore, Petitioner's asserted error is not based on an important question of federal law that has yet to be determined. Instead, Petitioner complains that the court of appeals misapplied law that has already been established by *Blessing*, *Harris*, and *Kissimmee River Valley*. This type of error is inappropriate for this Court's review. *See* Sup. Ct. R. 10. Accordingly, this Court should deny the Petition. *See id.*

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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